PAPERS AND DISCUSSION[1]

THE PROPOSED LEGISLATIVE CONSTITUTION OF INDIANA

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It should be distinctly understood at the outset that the proposed constitution of Indiana is a means, and not an end. The chief cause of its existence was the desire of Democratic leaders of the state to purify the suffrage in Indiana. This was not wholly an altruistic motive. The more intelligent Democratic leaders have been convinced for years that the only safety of the party lay in honest elections. That is why, in 1889, Indiana became a leader in the adoption of the Australian ballot law, and the most stringent and efficacious bribery law that has ever been devised, both of which were adopted as Democratic party measures.

At the legislative session of 1911, the Democratic party, for the first time, in eighteen years, came into full possession of the legislative power of the state. During those eighteen years, every Democratic effort to purify elections had been gracefully and effectively smothered. But, in 1911, the Democrats found their opportunity blocked by a legal complication. The constitution of the state fixes the qualifications of voters, and these can neither be added to nor taken from by statute law. To amend the constitution, the proposed constitutional amendment must be adopted by two successive legislatures, and by a majority vote of the people.

But the constitution also provides that when one amendment is pending, either before the legislature or before the people, no other amendment can be submitted. In 1897, a comparatively unimportant amendment was introduced, providing that the legislature might prescribe qualifications for admission to the bar. It was adopted by

[1] The Presidential Address of Governor Baldwin entitled *The Progressive Unfolding of the Powers of the United States* appears in the AMERICAN POLITICAL SCIENCE REVIEW, February, 1912.

two legislatures, and has been submitted to the people three times—in 1900, 1906 and 1910—and each time there was no majority of the votes for or against it. Our supreme court has decided that an amendment, once submitted, remains pending until a majority vote for or against it, and therefore no other amendment can be introduced while that situation exists (69 Ind. 505., 156 Ind. 104).

In this emergency, Governor Marshall suggested that, while the legislature had no power to propose an amendment, it had power to submit to the people a new constitution, which is an entirely different thing. The existing constitution makes no provision whatever for the adoption of a new constitution beyond the general declarations that "The people have at all times an indefeasible right to alter and reform their government," and "The legislative authority of the State shall be vested in the General Assembly."

So far as I am informed, nobody disputes that the legislature has power to call a constitutional convention, although the constitution makes no mention of it; and this has been done in a number of states similarly situated. But it is questioned that the legislature has power to submit a new constitution to a vote of the people directly; and this view has been taken by Judge Remster, of the Marion Circuit Court, before whom the question was raised. An appeal has been taken to the supreme court, and it is commonly assumed that it will decide in the same way, because a majority of the judges are Republicans. Judge Remster is a Democrat.

The central issue is this: The advocates of the proposed constitution hold "that the legislative authority of the State" is a common law term, borrowed from Great Britain, where it means the legislative power of Parliament, including power to amend or revise the constitution at will; that this power was originally exercised by the legislatures of the colonies, most of which adopted constitutions without submitting them to the people; and it was judicially recognized that succeeding legislatures had equal power to amend these constitutions (3 McCord, 354); that the only restraint on this power is by written constitutions; that the extent of this power in Indiana has been established by an unbroken line of decisions that: "The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the Federal constitution, and by the laws and treaties made under it" (6 Blackford, 299; 101 Ind. 564; 163 Ind. 512, and cases cited); that the power of adopting a constitution is reserved to the people by the

declaration above quoted; but that the mode of submitting a new constitution to the people, in the absence of any express constitutional provision, is purely a matter of legislative discretion, over which the courts have no jurisdiction.

Judge Remster's position is that the power to submit a new constitution to the people is not included in "the legislative power of the State," although there is no prohibition of such submission in the constitution; and that the attempt to submit it is void *ab initio*. He therefore enjoined the state election board from putting the question on the ballots, or, in other words, enjoined the people from exercising their inalienable right at this time.

It is not my purpose to discuss the legal aspects of the question, further than to say that Judge Remster's decision has not had the slightest effect in convincing any lawyer who has examined the question, and has once recognized the legislative power. There is simply a conflict of legal opinions; and that is nothing uncommon as to constitutional questions in this country. The American people have been disputing what the Federal constitution and the several state constitutions mean ever since they were adopted. These differences of constitutional opinion are what have made the great political parties of the country, and most of the politics of the country.

What I wish to present is some of the reasons for these differences of constitutional opinion; but before proceeding to that, attention may be called to two points:

1. If Judge Remster is right, we have been operating in Indiana for the last sixty years without a legally adopted constitution. Our first constitution was adopted in 1816, under an enabling act of Congress, by a convention elected precisely as the lower house of the Territorial legislature. This convention adopted our first constitution without submitting it to the people. The enacting clause reads: "We the representatives of the people of the territory of Indiana do ordain and establish the following constitution or form of government; and do mutually agree with each other to form ourselves into a free and independent state, by the name of the State of Indiana." This first constitution provided that a vote of the people should be taken every twelfth year on the question of holding a constitutional convention. If the people favored it, and "a majority of all the members elected to both branches of the General Assembly" agreed to it, a convention was to be called, with "power to revise, amend or change the constitution."

No attention was ever paid to these provisions. The question of holding a convention was submitted to the people in 1828, but the report of the vote by the Secretary of State shows returns from only 10 of the 58 counties, the total being 3496 for, and 6130 against a convention. (House Journal, 1828–9, p. 559.) In 1840 the question was again submitted, with a result of 12,277 for, and 61,721 against, in 69 counties, 14 counties making no returns. (Doc. Journal, 1840, Doc. No. 12.) In the face of this vote of five to one, the question of further submission was agitated all through the forties, and another vote was taken in 1846, which resulted 33,175 for a convention and 28,843 against, a total of less than half of the 126,123 votes cast at the election.

Notwithstanding this record, and notwithstanding the opposition of legislators who urged that there was no constitutional right to submit the question except at a twelfth year period; (W. W. Thornton, in Report of Indiana Bar Association, 1902, p. 152) in 1849, the legislature submitted to the people the question of calling "a convention to alter, revise or amend the constitution," and the vote favored it. The next legislature provided for a convention, but for a convention not clothed with the powers provided for by the constitution and by the vote of the people. It was directed merely to draft a constitution for submission to the next legislature, which was done; and the next legislature submitted it to the people, with no more authority than is given by our present constitution.

The lack of constitutional authorization was recognized in the debates of the convention of 1851, but the action was defended on the ground that the constitution did not prohibit the mode followed (Debates, pp. 1938–39.). The convention and the people adopted that view, and it is exactly the view taken in numerous decisions of our supreme court, as quoted above.

2. Neither the decision of Judge Remster, nor one by the supreme court to the same effect, will stop this reform movement; because it is a moral reform movement, and such movements are not killed by court decisions, nor by any other obstacles, any more than the anti-slavery movement was stopped by the Dred Scott decision. They simply keep on growing and accumulating force by discussion and agitation. Like the waters of a flood, if they cannot find an outlet in one channel, they will find it in another; and if channels are too difficult to find, they wash out dams, and sweep on in their course, overwhelming everything that stands in their way.

The most commonly recognized division of constitutional opinion, or bias, is on the line of strict construction and liberal construction. In a general way, the Democratic party has been the party of strict construction, and its opponents, the Federalists, Whigs and Republicans, have stood for liberal construction. Properly, this division applies only to the Federal constitution and not to the state constitutions. The reason is that the United States is a government of delegated powers, the instrument of grant being the constitution itself; whereas the states retain all sovereign power not granted to the United States. Each state constitution divides its sovereign powers into three parts, and vests those powers in the executive, legislative and judicial departments. The remainder of each state constitution consists of limitations on the powers thus conferred. Hence, as to an act of Congress, the constitutional question is "Does the constitution authorize the act?" But as to a state legislature the question is "Does the constitution prohibit the act?" The principle of strict construction therefore has no application to a state constitution; and yet there are many persons who carry their ideas of strict construction into the consideration of the question of constitutionality of action by a state legislature. This is the obvious explanation of Judge Remster's decision, for he puts as strict a construction on the state constitution as John C. Calhoun ever put on the Federal constitution, and holds, not that this legislative action is prohibited, but that it is not included in "the legislative authority of the state."

The second cause of the divergence of constitutional opinion, or bias, is the nature of the reforms proposed. If one has paid attention to legislation in the United States, he must have been struck by the great number of repeal laws. Each one of these usually means that an attempt has been made to accomplish some purpose in a certain way, but that on practical trial it has either failed or has produced some bad result that was not contemplated. In other words, these are applications of superficial remedies. In England they do reform work more rationally than we do, because their government is more permanent, and because cabinet government involves a close connection between politics and government, inasmuch as the cabinet proposes the legislation. When a British cabinet contemplates a reform law, it usually begins by appointing a commission to study the question —not a one-sided commission, with preconceived ideas, nor a bipartisan commission which you know in advance will present majority and minority reports, each intended to bolster up some theory, but a

commission of men of various points of view who endeavor to get at the facts, and to ascertain what is really wrong, before proposing a remedy—just as a good physician diagnoses his case carefully before he prescribes, and then adopts whatever remedy is needed. The object of this system is, of course, to ascertain the correct policy before committing the party in power to any policy.

Mr. Edwin Chadwick, whom I consider the wisest legislator of the last century, and who served on more than twenty of these British commissions, makes the astounding statement that he never knew an investigation "which did not reverse every main principle, and almost every assumed chief elementary fact, on which the general public, parliamentary committees, politicians of high standing, and often the commissioners themselves, were prepared to base legislation (The Health of Nations, Vol. I, p. 127.)."

The plain meaning of this is that in these cases the real source of evil was something not apparent on superficial examination, and the remedies originally contemplated were superficial remedies that did not reach the source of the evil at all. Very brief reflection will show the reason why this is true. Whenever an evil in government is persistent or chronic, it is because the source of the evil is obscure. If there were any plain, easily discovered remedy for it, that remedy would have been applied early, and the evil would never have become chronic. To make another medical illustration (for doctoring governmental ills is very much on the same principle as doctoring physical ills) you cannot cure a germ disease of the blood, that manifests itself through eruptions on the skin, by applying salves and lotions to the skin. You have got to find the germ and kill it in the blood; or, for prevention, you must kill it before it gets into the blood; and either of these is liable to involve some round-about method that invites skepticism. For example, if any one had told our grandfathers that the way to get rid of malaria was to kill mosquitoes, they would have hooted at the proposition.

In governmental affairs, the proposal of any new or unusual method always rouses the objections of those who do not want to get out of the rut; and they usually have some color of constitutional objection in the fact that the makers of the constitution could not have contemplated a thing if it is actually new. New measures must depend for their justification on general principles, and not on specific intent to provide for them.

It has been my fortune, or misfortune, to have been more or less

connected with reform legislation for the last twenty-five years, and I do not recall an innovation, to correct an evil, that was not pronounced unconstitutional by a considerable body of citizens. When the Australian ballot law was adopted in Indiana, the worst obstacle we had to overcome was the idea, especially championed by David B. Hill, that suffrage was a natural right, and that a man had an inalienable right to vote for any one he preferred for any office; in consequence of which he could not be prohibited from writing a name on the ballot. The point was vital, because a written name was a common mode of identifying a vote that had been purchased. Argument that suffrage was not a natural right, but an artificial right, conferred by the state, had no effect but to raise a storm of indignant protest; and in 1891 a formidable amendment was made to the law, which allows any one to vote for whom he pleases by means of a paster ballot, which, however, is so cumbersome and expensive a method that nobody has ever attempted to use it. Since then most of the courts have reached the conclusion that suffrage is not a natural right, but there are some learned decisions on the subject that I would include in humorous literature, because to me the idea that a man can have a natural right to any artificial thing that is not the product of his own labor is too absurd to admit of discussion.

This seemingly indirect method of reaching evils is used in the two features of the proposed constitution that embody the most important changes offered by it. One is the effort to purify elections, first, by requiring an educational test for suffrage; second, by requiring the prepayment of poll taxes; and third, by restricting suffrage to citizens of the United States. The first is essential because if you allow illiterates to vote, you are obliged to allow some one to mark their ballots, which destroys the secrecy of the ballot, and affords an easy method for systematic vote-buying. The second is essential because a large part of the class who sell their votes are included in the class who do not pay their poll taxes. The common mode of buying votes by the taking out of poll tax receipts by political parties, is sought to be avoided by requiring the prepayment of poll taxes, without delinquency, both in the year of the election and in the year preceding. The third is also a class distinction. The constitution makers of 1851 gave suffrage, on six months' residence, to immigrants who had declared their intent to become citizens, for the avowed purpose of encouraging immigration to the state. But at that time the state had large amounts of unoccupied land, and the immigrants then coming became

permanent residents; while in recent years there has appeared a large class of immigrants who have no real intent to become citizens, but only to accumulate enough money for comfortable living in their native countries; and who have no interest in a vote except to sell it. In fact, they are commonly "naturalized" in blocks, by political parties that have already bargained for their votes.

The other feature is the elimination of the gerrymander by making the county the basis of legislative representation. This was attacked as unconstitutional on the ground that it violated the provision of the Ordinance of 1787 guaranteeing "proportionate representation." The assailants of the constitution assumed that this meant numerical representation, such as we attempt at present, but it does not, for the simple reason that there was no such thing as numerical representation in existence in 1787, but all representation was based on the county, or on some other municipal division. Furthermore, it has been decided repeatedly, by the highest courts, that the Ordinance of 1787 is not in effect in any state, and its "forever unalterable articles of compact" remain only as they are preserved by the state constitutions (10 Howard, 82; 107 U. S., 689).

This brings us to the fourth cause of divergence of constitutional opinion, which is the idea that one generation can tie up future generations by any kind of law—the idea that there is something in constitutional government that cannot be changed. You have, of course, all read Daniel Webster's great answer to Hayne, in which he said that these unalterable articles of compact in the Ordinance of 1787 were deeper and stronger than any constitution, and that idea prevails with many people. The conclusive answer to this is the declaration of the constitution itself, that "the people have, at all times, an indefeasible right to alter and reform their government." No generation can take that right from its successors. The state would not be "sovereign" if it could. As Thomas Jefferson tersely put it: "The earth belongs to the living, and not to the dead" (Works, Vol. 3, p. 106; see also Writings, Vol. 15, p 40).

The fifth and last cause of divergence of constitutional opinion and bias, to which I shall call your attention, is that most of the American people do not really believe those things which we have declared to be axiomatic truths, and on which our whole theory of government rests. Our forefathers asserted in the Declaration of Independence that "all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life,

liberty and the pursuit of happiness." The same thing was repeated in every state constitution in the Union. In the face of this, they maintained slavery, and justified depriving men of their inalienable right to liberty. It took more than half a century of bickering, and five years of bloody war to make the nation actually believe that all men have an inalienable right to liberty. Is it strange, in the light of that, that some people question the right of the people to change their constitution, when they wish to do so?

Among the "unalterable articles of compact" of the Ordinance of 1787, is the provision that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." In the Indiana constitution of 1816, our forefathers dropped "religion and morality," and made it "knowledge and learning, generally diffused through a community, being essential to the preservation of a free government." This was repeated in the constitution of 1851. Do the people of Indiana believe this? It is what their common-school system is based on—not the benefit of education to the individual, but the benefit to the state. They are paying over $8,000,000 a year for free schools. They have a compulsory education law. They have truant officers to enforce attendance. If a child lack the clothing or books necessary for school attendance, the public supplies them. And yet we say to the Indiana boy who manages to evade the law, and to grow up illiterate, we will reward you by giving you the highest privilege of citizenship. Do we really believe this axiomatic truth of our constitution that education is essential to the preservation of free government? If we do there will be little hesitancy about making an educational test for suffrage.

While there are these reasons for divergent views as to the mode of action proposed, there is no reason for difference of opinion as to the ends sought to be attained by this proposed constitution. Any American who is fit for citizenship believes in honest elections, and ought to do what he can to secure them. I would urge this on the members of this association. You are men who influence political sentiment. You have a voice in the future of this country; and I urge you to stand firmly, always, and above all things, for honest elections. I say to you that the evil which is sapping the very life of this nation today is the corruption of the suffrage. It is the cause of nine tenths of the misgovernment we have; and so long as it continues, popular government is little more than a farce.

The evil is not restricted to Indiana. It exists in every state of the Union. And everywhere you see its effects recognized, and superficial remedies offered for them. Everybody realizes that something is wrong—that in some way popular government is not working out as it should. They see government controlled by associated interests, and political machines. They seek to remedy this by the introduction of direct primaries, by the initiative, referendum and recall, by commission government, by the short ballot. My friends, these are only salves applied to the skin to cure a blood disease. Think, for a moment. What do direct primaries amount to, if the voters are bought? What are the initiative, referendum, or recall if the appeal is to a debauched electorate? What is commission government, if the commissioners can buy their elections? What difference whether a man vote a long or a short ballot, if his vote is sold? Of what avail to try to control the "big business" of the country, so long as we allow it, by the supply of campaign funds, to buy the election of men who will serve it? The first and greatest requisite—the one without which all others amount to nothing—is the purification of elections.

I therefore ask every honest man to stand unflinchingly for honest elections. It is not very material whether a man believe that the legislature has power to propose a constitution or not. It is not very material whether a man call himself a Democrat, a Republican, or a Prohibitionist. But we are all American citizens, and it is material that, whatever else we may believe, we should believe in honest elections, as the only means of ascertaining the public will, and insuring free government. It is material that we should stand first of all for honest government, if we want this republic to live. It may take some years to impress this truth on the American people, because they are slow to learn, despite their intelligence. But it will come; and when the history of this period is written, in the clearer light of the future, no man will have a prouder record of statesmanship than this of having forcibly called public attention to the real cause of misgovernment, and having earnestly endeavored to remedy it, which has been done by Gov. Thomas R. Marshall, of Indiana.